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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 ETIENNE L. CHOQUETTE,

9 Plaintiff,

v.

10 BERNARD E. WARNER, et al.,

11 Defendants.
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CASE NO. C15-5838 BHS-JRC

ORDER ADOPTING REPORT
AND RECOMMENDATION

13 This matter comes before the Court on the Report and Recommendation (“R&R”)
14 of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 108), and
15 Defendants’ objections to the R&R (Dkt. 112).

16 The background of this case is set forth in the underlying R&R, which was filed
17 on December 12, 2017. Dkt. 108. On December 27, 2017, Defendants filed their
18 objections. The district judge must determine de novo any part of the magistrate judge’s
19 disposition that has been properly objected to. The district judge may accept, reject, or
20 modify the recommended disposition; receive further evidence; or return the matter to the
21 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).
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1 Defendants first object to the R&R's reliance on the testimony of P.A. Phillips.
2 Dkt. 112 at 1–3. The Court has already resolved this issue in its previous order regarding
3 the R&R on Defendants' motion to exclude. Dkt. 117 at 2. There the Court determined
4 that Judge Creatura properly considered the testimony of P.A. Phillips. *Id.* The Court
5 need not address the issue again.

6 Defendants next object on the basis that the R&R failed to account for the
7 testimony of Dr. Wundes that it was not unreasonable to try baclofen instead of
8 gabapentin. However, just because Dr. Wundes agrees that it was not unreasonable to try
9 an increased dosage of baclofen to address possible spasticity does not mean he agrees
10 that it was reasonable for Defendants to entirely stop Plaintiff's concurrent dosage of
11 gabapentin for his neuropathic pain. In fact, other testimony from Dr. Wundes suggests
12 that he believes it was unreasonable to stop administering gabapentin. Dkt. 91-1 at 10–11,
13 21. Nor does this statement from Dr. Wudnes's deposition address Defendants failure to
14 promptly reinstate the gabapentin treatment after it was clear that the baclofen was not
15 helping Plaintiff's neuropathic pain. The R&R did not err in declining to consider this
16 statement as convincing evidence that Dr. Wundes believed it was reasonable for
17 Defendants to stop Plaintiff's gabapentin treatment in contravention of multiple
18 recommendations from treating neurologists.

19 Defendants also object to the R&R by arguing that there is insufficient evidence to
20 show that individual defendants had any personal knowledge that Plaintiff was suffering
21 from neuropathic pain. To the contrary, there are numerous pieces of evidence to suggest
22 that Defendants had been informed and were aware of Plaintiff's neuropathic pain,

1 including: (1) he had previously been treated with gabapentin for his multiple sclerosis by
2 the Department of Corrections, Dkt. 91-2 at 26; (2) materials used by Defendants stated
3 that multiple sclerosis can result in neuropathic pain and should be treated with
4 gabapentin, *id.* at 19–20; and (3) Defendant Duvall specifically informed Defendant
5 Hammond that Plaintiff was suffering from neuropathic pain in the form of a “significant
6 reflex arc.” *Id.* at 37. Defendants point out that the original non-formulary request on
7 November 27, 2013, made no specific mention of neuropathic pain. *See* Dkt. 84-1 at
8 173.¹ But that does not overcome the significant evidence indicating that Defendants
9 knew neuropathic pain is frequent or even expected with multiple sclerosis, that
10 gabapentin is a first-line treatment for such pain, and that Defendants refused to provide
11 Plaintiff with the gabapentin treatment recommended by his treating neurologist.
12 Moreover, Defendants’ argument regarding the first non-formulary request fails to
13 address concerns raised by Defendants’ denial of the second non-formulary request after
14 it was evident that baclofen was not resolving Plaintiff’s apparently debilitating
15 neuropathic pain. *See* Dkt. 91-3 at 7–8.

16 Finally, the Court rejects Defendants contentions that they are entitled to qualified
17 immunity under the precedent of *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866–68 (2017), and
18 various First, Seventh, and Tenth Circuit decisions. However, even though these
19 decisions indicate a varying degree of weight to be afforded treating and non-treating
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21 ¹ Notably, the report states that Plaintiff suffers from multiple sclerosis and radiculopathy
22 and was already taking both gabapentin and baclofen, although the parties do not discuss how
these statements might be synonymous with, or at least a clear indicator of, neuropathic pain.

1 physicians in the context of qualified immunity, the underlying principle remains that
2 “[t]he choice of *a medical option that, although disfavored by some in the field, is*
3 *presented by competent professionals* does not exhibit a level of inattention or
4 callousness to a prisoner’s needs rising to a constitutional violation.” *Kosilek v. Spencer*,
5 774 F.3d 63, 91–92 (1st Cir. 2014) (emphasis added). Accordingly, even if these cases
6 are considered, Plaintiff’s claims still survive summary judgment as there is sufficient
7 evidence to suggest that Defendants’ denial of Plaintiff’s multiple non-formulary requests
8 goes beyond a disfavored medical option and instead consists of a deliberate or reckless
9 disregard to Plaintiff’s apparent neuropathic pain and need for adequate medication.

10 The Court having considered the R&R, Plaintiff’s objections, and the remaining
11 record, does hereby find and order as follows:

- 12 (1) The R&R (Dkt. 108) is **ADOPTED**; and
13 (2) Defendants’ motion for summary judgment (Dkt. 82) is **DENIED**.

14 Dated this 13th day of February, 2018.

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17 BENJAMIN H. SETTLE
United States District Judge
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